IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

KAREN ARMSTRONG,	:	
	:	
Plaintiff,	:	
	:	Civil Action No.
vs.	:	4:13-CV-00050-HLM
	:	
FLOYD COUNTY, GEORGIA, et al.,	:	
	:	
Defendants	:	

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS CITY OF ROME, GEORGIA, ROME-FLOYD PARKS AND RECREATION AUTHORITY, AND RICHARD GARLAND'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

COMES NOW the Plaintiff, Karen Armstrong ("Plaintiff" or "Armstrong") and files this *Plaintiff's Brief in Opposition to Defendants City of Rome, Georgia, Rome-Floyd Parks and Recreation Authority, and Richard Garland's Motion to Dismiss Plaintiff's Second Amended Complaint,* as follows:

I. BACKGROUND

Defendants City of Rome, Georgia ("Rome"); Rome-Floyd Parks and Recreation Authority ("RFPRA"); and Richard Garland ("Garland") (collectively referred to as "Defendants" or "these Defendants"), filed a previous Motion to Dismiss (Doc. 19) on April 10, 2013. Plaintiff filed a Response (Doc. 23), along with an Amended Complaint (Doc. 24), on April 24, 2013. These Defendants renewed their Motion to Dismiss as to the Amended Complaint (Doc. 27).

On May 10, 2013, this Court entered an Order (Doc. 28) granting the Motions to Dismiss filed by these Defendants, and dismissing Plaintiff's Complaint and Amended Complaint without prejudice with respect to these Defendants.

The Court's May 10, 2013, Order set the parameters for what Plaintiff must do to satisfy the relevant pleading requirements and survive another Motion to Dismiss. This Court's May 10, 2013 Order rejected the bulk of Defendants' substantive arguments. (Indeed, these Defendants' instant motion is little more than an attempt to rehash previously rejected arguments.) Specifically, the Court rejected these Defendants' argument that Plaintiff's Complaint and Amended Complaint consisted primarily of legal conclusions and conclusory allegations. (Doc. 28 at 21 n.2). This Court rejected Defendants' contentions that Plaintiff had not pled sufficient facts to satisfy the requirements for municipal liability under Monell v. Department of Social Services, 436 U.S. 658 (1978); that Plaintiff had not alleged sufficient facts to overcome a defense of qualified immunity by Garland; and that Plaintiff did not state a claim for relief under O.C.G.A. § 36-33-4. (Id. at 23 n. 4).

In its May 10, 2013 Order, this Court held that, although Plaintiff's Complaint and Amended Complaint "set forth fairly detailed factual allegations," "the actual counts contained in those documents . . . set forth only legal conclusions, and, at most, recite the bare elements of Plaintiff's claims." (Doc. 28 at 21). This Court further held that "Plaintiff fails to identify which factual allegations support each of her claims, instead realleging all of her previous factual allegations at the beginning of each count." (Id.). This Court also held that "for many of her claims, Plaintiff fails to specify against which Defendants she asserts the claims." (Id. at 22). In dismissing the Amended Complaint without prejudice, the Court afforded Plaintiff fourteen (14) days within which to file a Second Amended Complaint to address the concerns laid out in its May 10 Order. (Id. at 24-25). Accordingly, Plaintiff filed her Second Amended Complaint (Doc. 29) on May 13, 2013. That Second Amended Complaint clarified which factual allegations related to which legal claims, and which legal claims related to which Defendants.

Despite this Court's prior rulings and Plaintiff's filing of her Second Amended Complaint to address these Defendants' objections to her first two Complaints, Defendants filed the instant Motion to Dismiss Plaintiff's Second Amended Complaint on or about May 28, 2013. Ironically, while Defendants accuse Plaintiff's complaints of "containing conclusory allegations, legal conclusions, unwarranted inferences, and 'threadbare recitals'" it is Defendants' Motion that is conclusory, threadbare, and lacking in analysis.

II. STATEMENT OF FACTS

The facts alleged in the Second Amended Complaint were accurately outlined by the Court in its May 10, 2013 Order (although the numbering and organization of those facts have changed). Plaintiff hereby incorporates, by reference, the Statement of Facts as outlined in Plaintiff's Second Amended Complaint (Doc. 29) and in this Court in its' May 10, 2013 Order (Doc. 28 at 7-18). Further, these Defendants have accurately stated the facts in support of the instant Motion. Plaintiff will cite in the argument section the facts that appropriate apply to each legal argument.

III. LEGAL ARGUMENT AND CITATION TO AUTHORITY

A. With respect to arguments previously submitted by Defendants and rejected by this Court, the instant Motion should be construed as a Motion to Reconsider, and rejected on that basis.

As Defendants admit in their brief, this Court has already plainly ruled that "the Complaint and Amended Complaint do not consist of legal conclusions or conclusory allegations" (Defendants' Brief [Doc. 33-1] at 1-2, *quoting* the May 10, 2013 Order [Doc. 28] at 21 n.2). The Second Amended Complaint is not somehow more conclusory; it contains essentially the same factual allegations, organized in order to clarify which facts relate to which legal claims, and which legal claims relate to which defendants. These Defendants also re-raise the arguments previously rejected by this Court with respect to the qualified immunity of Garland, the Monell liability of RFPRA and City of Rome, and Armstrong's claims under O.C.G.A. § 36-33-4. Therefore, Defendants are asking this Court to reconsider a previous Order, and their Motion should be considered a Motion to Reconsider with respect to these arguments.

This Court's Local Rule 7.2(E) provides that "[m]otions for reconsideration shall not be filed as a matter of routine practice[,]" but rather, only when "absolutely necessary." "Such absolute necessity arises where there is '(1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact.' A motion for reconsideration may not be used to present the court with arguments already heard and dismissed or to repackage familiar arguments to test whether the court will change its mind.'" Cruz v. Davidson, 2012 WL 3756860 *3 (N.D. Ga. 2012), *quoting* Bryan v. Murphy, 246 F.Supp.2d 1256, 1258-59 (N.D. Ga. 2003).

With respect to arguments previously rejected by this Court, these Defendants have not shown the existence of any of the three conditions set forth in the local rule. Nor have Defendants submitted new arguments that would demonstrate "clear errors of fact and law" in this Court's previous Order. Accordingly, Plaintiff respectfully requests that this Court decline to reconsider any and all arguments advanced by Defendants on which this Court has previously ruled; specifically, (1) that the Second Amended Complaint is merely conclusory and does not contain sufficient factual details; (2) Garland is entitled to qualified immunity based on the facts alleged; (3) Armstrong cannot establish Monell liability on the part of the City of Rome and RFPRA; and (4) that Plaintiff does not set forth a legal claim under O.C.G.A. § 33-36-4.

B. Plaintiff's Second Amended Complaint, like her previous complaints, contains significant factual detail, and more than satisfies the requirements of Rule 8 and Supreme Court precedent.

Defendants continue to delay discovery in this case by rehashing meritless and previously-rejected assertions (and they are that, simply assertions) that Plaintiff's Second Amended Complaint does not meet basic pleading requirements. The instant motion, like the abusive motions decried by Judge Clay D. Land, "view every factual allegation as a mere legal conclusion and disparagingly label all attempts to set out the elements of a cause of action as 'bare recitals.'" See Order of December 12, 2012 in Mayer v. Snyders Lance, Inc., Case No. 4:12-cv- 00215 (attached hereto as Attachment 1). As shown below, Plaintiff's Second Amended Complaint sufficiently pleads factual bases to support her legal claims under the Twombly-Iqbal standard.

1. *Plaintiff's Claims Are Sufficiently Pled under Rule 8 and the Twombly-Iqbal Standard*

Defendants' Motion asserts, without analysis, that the following Paragraphs of Plaintiff's Second Amended Complaint "are conclusory in nature, are legal conclusions, or contain impermissible inferences and thus should be eliminated…Paragraphs 23-24, 26-39, 40-51, 52-55, 56-58, 59-62, 63-65; and the unnumbered Paragraphs containing Plaintiff's prayer for relief." In doing so, Defendants again seek to isolate individual paragraphs, divorcing them from their context, and asserting that individual words in the paragraphs are somehow inappropriate or conclusory. It is impossible to tell exactly what Defendants find objectionable about the isolated language because, as opposed to giving the Court any kind of analysis or explanation for why these paragraphs are conclusory, Defendants simply quote the "offending" paragraphs and italicize the words and phrases that are, presumably, objectionable. We are all left to guess what the basis for each objection is. Defendants cite no law supporting their arguments, yet ultimately conclude "as these Paragraphs are not 'well-pleaded factual allegations,' they should be eliminated from…determination."

True, Plaintiff's Second Amended Complaint does contain legal conclusions and logical inferences. But these are conclusions that Plaintiff derives from specific facts that are also set forth in the Complaint. Twombly and Iqbal do not forbid plaintiffs from making legal conclusions (indeed, it would be impossible to plead a legal claim under such circumstances); those cases simply stand for the proposition that a Complaint must contain *more than solely* legal conclusions. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Iqbal, 129 S. Ct. at 1950.

The folly of Defendant's position is illustrated by, for example, their isolation of paragraph 23, which states that "Defendant Garland acted *without any probable cause* to believe Armstrong had committed a crime" and that "Garland *initated* a criminal investigation." (Defendants' Brief [Doc. 33-1] at 10, emphasis in original). Even if it were true that the phrase "lack of probable cause" states a legal conclusion[1], that conclusion is here supported by numerous factual statements, including that Garland knew that other coaches at the RFPRA regularly deposited funds from parents into their personal bank account, for sports-related purposes, and that doing so was not indicative of theft (See Second Amended Complaint at ¶¶ 20, 23); Armstrong was able to demonstrate her innocence to Garland by accounting for all program funds, a fact that Garland hid from investigators (Id. at 25-26); Garland knew there was no RFPRA policy prohibiting such action (See ¶¶ 21, 23); Garland knew that the assistant gymnastic coach regularly did the exact same thing, yet he never investigated her, and later promoted her to fill Armstrong's position (See ¶ 22); Garland refused to turn over exculpatory evidence to investigators (See ¶¶ 29-31);

[1] It is not. "Lack of probable cause shall be a question for the jury, under the direction of the court…[u]nless the facts regarding probable cause are undisputed, it is a question for the jury". Willis v. Brassell, 220 Ga. App. at 353.

Garland sought to financially benefit from the arrest and prosecution of Armstrong (See ¶ 32).

And, the allegations that Garland "initated" and "urged" the investigation—again, assuming for the sake of argument that these are legal conclusions—are supported by numerous factual allegations, including the above-mentioned allegations that Garland withheld exculpatory evidence and information from investigators, which any reasonable person would know would further an otherwise meritless investigation, and the fact that Garland initiated the contact with the Rome police, met with the investigator numerous times, and was the primary person to provide the investigators with incriminating evidence that he knew to be false and incomplete. (See id. at ¶¶ 21-23, 25-26, 29-31)."

To go through and explain the context of each paragraph isolated by Defendants, and each term italicized by Defendants, would take more pages than this Court would allow, and is frankly unnecessary. Any reasonable reader of the Complaint will understand the facts and legal conclusions in proper context (as this Court did, as indicated in its May 10, 2013, Order). It took Defendants over 10 full pages to copy-and-paste the offending paragraphs, and to italicize certain words. As shown above, it took over a page and a half to explain the context of one single paragraph isolated by Defendant.

Indeed, it is difficult to envision what Defendants' would require in order satisfy the relevant pleading standards. Perhaps a novel with Tolstoy-level detail as to the psychology and background of each player, with pages dedicated to each minute detail of each transaction and occurrence, would satisfy Defendants. This, of course, would need to come with detailed endnotes, explaining the etymology of each word used, to ensure that the words could not be considered "conclusions."

In any case, as this Court has correctly held, the Complaint contains a detailed statement of the facts, and is not merely speculative.

C. Each of Plaintiff's counts, as pled, state a claim for which relief may be granted.

Defendants argue that each of Plaintiff's counts fail as a matter of law. These arguments, like the arguments as to the legal sufficiency of the factual allegations, are made up primarily of assertions without analysis.

1. Plaintiff will concede certain claims in order to streamline the case

Now that Defendant Floyd County has placed into the record the warrant upon which Armstrong was arrested, it is clear (as discussed below) that the claims arising from Armstrong's wrongful arrest and prosecution sound in "malicious prosecution" as opposed to "false arrest." Therefore, Plaintiff will not contest the Motion with respect to Count I: O.C.G.A. § 51-7-1 (State Law False Arrest) and Count II: 42 U.S.C. §1983 (Federal False Arrest). However, Plaintiff requests that this Court dismiss those claims *without prejudice* so that, if there is a change in the law or discovery of additional facts to support those claims, Plaintiff may re-assert them. Plaintiff will also concede the punitive damages claim as to City of Rome, RFPRA, and Floyd County.

2. *Count III: O.C.G.A. § 51-7-40 (State Law Malicious Prosecution Tort)*

Plaintiff has stated a claim for malicious prosecution under Georgia law. The Eleventh Circuit has recognized the following state law elements of a malicious prosecution claim: (1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and without probable cause; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused. Wood v. Kesler, 323 F.3d 872, 882 (11th Cir. 2003). *See also* O.C.G.A. § 51-7-40.

Defendants only contest two elements of this claim, first that Plaintiff has failed to show that she was arrested "under process of law," and second that Plaintiff has failed to establish a want of probable cause.

Defendants' argument that Plaintiff has not established she was arrested under process of law is plainly wrong. Plaintiff was arrested pursuant to a warrant. If there was any question as to whether her arrest was pursuant to a warrant or not, that ambiguity is resolved by the warrant attached to Defendant Floyd County's Motion for Judgment on the Pleadings. (Doc. 32-1). This Court may take judicial notice of this public record even on a motion to dismiss. Davis v. Williams Commc'n, Inc., 258 F. Supp. 2d 1348, 1352 (N.D. Ga. 2003).

"Obtaining an arrest warrant is one of the initial steps of a criminal prosecution…[and] where seizures are pursuant to legal process, we agree…that …the common law tort "most closely analogous"…is that of malicious prosecution". Whiting v. Traylor, 85 F.3d 581, 585 (11th Cir. 1996). Therefore, Plaintiff's arrest pursuant to warrant constitutes an "arrest under process of law."

Further, Defendant's are correct that Plaintiff's indictment creates a presumption of probable cause that Plaintiff must rebut. (Defendants' Brief at 23). Defendants then assert, without argument or analysis, that Plaintiff has failed to allege facts to rebut such presumption. (Id.).

Under Georgia law, "Lack of probable cause shall be a question for the jury, under the direction of the court…[u]nless the facts regarding probable cause are undisputed, it is a question for the jury". Willis, 220 Ga. App. at 353. Here, Armstrong has alleged numerous facts that state a facially valid claim for lack of probable cause. These facts include that Garland knew that other coaches at the RFPRA regularly deposited funds from parents into their personal bank account, for sports-related purposes, and that doing so was not indicative of theft (See ¶¶ 20, 23); Armstrong was able to demonstrate her innocence to Garland by accounting for all program funds, a fact that Garland hid from investigators (Id. at 25-26); Garland knew there was no RFPRA policy prohibiting such action (See ¶¶ 21, 23); Garland knew that the assistant gymnastic coach regularly did the exact same thing, yet he never investigated her, and later promoted her to fill Armstrong's position (See ¶ 22); Garland refused to turn over exculpatory evidence to investigators (See ¶¶ 29-31); Garland sought to financially benefit from the arrest and prosecution of Armstrong (See ¶ 32).

Therefore, Defendants' arguments with respect to Court III are wholly without merit.

3. *Count IV: Fourth Amendment to the United States Constitution 42 U.S.C. §1983*

Count IV of Plaintiff's complaint states a claim under 42 U.S.C. § 1983 for the violation of Armstrong's rights under the Fourth Amendment to be free from "unreasonable searches and seizures," which includes the right to be free from false arrest and malicious prosecution. A federal malicious prosecution claim under Section 1983 incorporates the elements of the common law tort of malicious prosecution. Wood, 323 F.3d at 881. As discussed in III(C)(2) *supra,* the common law elements of the tort of malicious prosecution are: (1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and without probable cause; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused. Id. at 882. For a federal malicious prosecution claim, the Plaintiff must also prove that she was "seized" pursuant to the Fourth Amendment. Id.

These Defendants assert that "Plaintiff has not alleged any facts to show that she 'was seized in relation to the prosecution, in violation of her constitutional rights.'" (Defendants' Brief at 24). As noted above, Armstrong has very plainly alleged that she was "seized" under the Fourth Amendment because she was arrested pursuant to a warrant. (See ¶¶ 33, 41). As discussed above, any ambiguity is resolved by the warrant attached to Defendant Floyd County's Motion for Judgment on the Pleadings (Doc. 32-1).

An arrest is a seizure under the Fourth Amendment. California v. Hodari D., 499 U.S. 621, 626-27, 111 S. Ct. 1547, 1550-51, 113 L. Ed. 2d 690 (1991). The Eleventh Circuit has made clear that an arrest pursuant to a warrant is a Fourth Amendment "seizure" for purposes of a § 1983 malicious prosecution claim. Whiting, 85 F.3d at 585; See also Grider v. City of Auburn, Ala., 618 F.3d 1240, 1258 (11th Cir. 2010) (bar owner arrested after surrender to police, on warrant for bribery, based on false statements by officer who swore out the warrant, possesses valid claim for Section 1983 malicious prosecution claim against officer); see also Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 3 (1st Cir.1995) (section 1983 claim for arrest and prosecution analogous to malicious prosecution tort where arrest pursuant to legal process); see also Singer v. Fulton County

Sheriff, 63 F.3d 110, 115-16 (2d Cir.1995) (holding that a § 1983 plaintiff alleging malicious prosecution must have been seized pursuant to legal process; when the "legal process" is in the form of a warrant, "the arrest itself may constitute the seizure").

Further, even a voluntary surrender by the Plaintiff following the issuance of an arrest warrant constitutes a seizure under the Fourth Amendment. See Albright v. Oliver, 510 U.S. 266, 271, 114 S. Ct. 807, 812, 127 L. Ed. 2d 114 (1994) ("surrender to the State's show of authority constituted a seizure for purposes of the Fourth Amendment"); Buckner v. Williamson, 3:06-CV-79 (CDL), 2008 WL 2415265 (M.D. Ga. June 12, 2008) ("Plaintiff turned herself in the morning after the warrants issued."); Whiting v. Traylor, 85 F.3d 581, 584-85 (11th Cir. 1996) (voluntary surrender after Plaintiff learned of criminal warrant was a seizure "that could be the basis of a section 1983 claim."); Cummisky v. Mines, 248 F. App'x 962, 965 (10th Cir. 2007) (rejecting lower court's holding that "…Plaintiff's self-surrender [was] insufficient to give rise to…Fourth Amendment seizure").

Finally, "[w]hen the seizure is part of the institution of a prosecution…injuries caused by the unlawful seizure may include those associated with the prosecution". Whiting, 85 F.3d at 586. Accordingly, Armstrong clearly has alleged a Fourth Amendment "seizure" by her arrest pursuant to warrant and has stated a § 1983 malicious prosecution claim. She may recover damages for all injuries stemming from her arrest and prosecution.

Moreover, where a public official causes the arrest and prosecution of another by withholding important information or making misrepresentations of fact, he is liable for malicious prosecution under § 1983. Buckner v. Williamson, 3:06-CV-79 (CDL), 2008 WL 2415265 (M.D. Ga. June 12, 2008). The Buckner case is closely analogous to the instant case. In Buckner, the University of Georgia Police Department was investigating whether an employee of one of the University's programs had stolen some University property. In fact, the employee worked from home, and had the property at her home for that purpose. The Director of the program knew that the employee worked from home and had the property there for that reason. However, when questioned by investigators, the Director did not disclose this information, and in fact provided officers with misleading information, which led to the employee's arrest and prosecution. Buckner v. Williamson, 3:06-CV-79 (CDL), 2008 WL 2415265 (M.D. Ga. June 12, 2008).

Defendant next asserts that Plaintiff has failed to allege "facts to show that Garland was acting under color of state law." This argument borders on the frivolous.

"Generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." West v. Atkins, 487 U.S. 42, 50 (1988). An officer or employee of a local government entity—including a local authority—who commits a wrongful act in the course of his duties in that position is "acting under color of state law," even where his conduct is abusive or would not otherwise be sanctioned by the local government. See e.g. Baxter v. Fulton-DeKalb Hosp. Auth., 764 F. Supp. 1510, 1518 (N.D. Ga. 1991) (physician for local hospital authority is acting under color of state law in performing his duties); Griffin v. City of Opa-Locka, 261 F.3d 1295, 1305 (11th Cir. 2001) (city manager who raped city employee after city-sponsored event acting under color of state law); Battista v. Cannon, 934 F. Supp. 400, 404 (M.D. Fla. 1996) (county sheriff's deputy who abused woman while on duty was acting under color of state law). And, most closely analogous to this case, an official is acting under color of state law in reporting to law enforcement authorities information about a subordinate employee's conduct in the course of that employee's work for the public entity. See Buckner, *supra*. (director of program at UGA acting under color of state law when withholding from police information that would exculpate employee from charges of stealing UGA property).

Quite plainly, Armstrong has alleged that Garland was acting under color of state law. (Second Amended Complaint [Doc. 29] at ¶ 4). Furthermore, Armstrong has alleged the RFPRA, of which Garland was the Executive Director, and under whose authority he acted, was an entity jointly created and controlled by two government entities, the City of Rome, Georgia, and Floyd County, Georgia. (Id. at ¶ 8). Furthermore, Armstrong has alleged that Garland's official duties extended to supervision and discipline of employees such as Armstrong, and to providing information to local authorities with respect to wrongdoing by employees such as Armstrong. (Id. at ¶ 9). These factual allegations, viewed under the applicable law, plainly are sufficient to allege that Garland was acting under color of state law when he took the wrongful acts complained of.

4. Count V: Intentional Infliction of Emotional Distress

With regard to this claim, Defendants do not really make any argument. Defendants simply recite the law applicable to claims for intentional infliction of emotional distress, and then assert that Armstrong has not pled sufficient facts to make out a claim. (Defendants' Brief at 26).

Plaintiff does not dispute the elements as set forth by Defendants. A claim for wrongful official conduct in carrying out an arrest or prosecution may give rise to a claim for intentional infliction of emotional distress, and an official is not entitled to immunity where his conduct is intentional and outrageous. Reed v. City of Lavonia, 390 F. Supp. 2d 1347, 1370 (M.D. Ga. 2005).

Plaintiff's Complaint states with specificity, that Defendant Garland, as the head of the RFPRA, intentionally and recklessly instituted and carried out the unjust and unwarranted prosecution of Armstrong with malice. (See Plaintiff's Second Amended Complaint at ¶¶s 23-25; 27-31; 52-55). These intentional and malicious acts by Garland directly resulted in the prosecution of Armstrong. (See Plaintiff's Second Amended Complaint at ¶¶s 23-25; 27). The prosecution resulted in emotional distress, humiliation, embarrassment, and damage to reputation. (See Plaintiff's Second Amended Complaint at ¶¶s 63-65). Unjust and unwarranted criminal prosecution, where one's freedom is at stake, for any reasonable person, would certainly "naturally give rise to such intense feelings of humiliation, embarrassment, fright or extreme outrage as to cause severe emotional distress." Defendants' implication that the public and unwarranted criminal prosecution of a well-loved community figure such as Armstrong would not "give rise to feelings of humiliation, embarrassment, fright or extreme outrage", is, itself, outrageous. See St. Mary's Hosp. of Athens, Inc. v. Radiology Professional Corp., 205 Ga. App. 121, 123 (1992).

5. Count VI: O.C.G.A. § 36-33-4

Plaintiff has stated a claim under O.C.G.A. § 36-33-4. The Georgia Court of Appeals has made clear that individual municipal officials are liable to anyone who they harm by an unlawful official act, and that O.C.G.A. § 36-33-4 sets forth an independent tort claim for such actions. In City of Buford v. Ward, the Court held, "a claim under OCGA § 36-33-4 is essentially a tort action in which general as well as compensatory damages may be recovered." 212 Ga. App. 752, 755, 443 S.E.2d 279, 283 (1994). Accordingly, a cause of action does exist under O.C.G.A. § 36-33-4, and Plaintiff has clearly pled facts sufficient to state a cause of action under O.C.G.A. § 36-33-4. As discussed at III(C)(2), III(C)(3), and III(C)(4) *supra*, and throughout Plaintiff's Complaint, Garland's official acts and failures to act were done "oppressively, maliciously, corruptly, and without authority of law". As these acts damaged Armstrong, Garland is individually liable under O.C.G.A. § 36-33-4.

6. Count VII: Punitive Damages[2]

Similarly, as discussed in Sections III(C)(2), III(C)(3), III(C)(4), and III(C)(5), *supra* and throughout Plaintiff's Complaint, Defendant Garland, individually, and as the Director of RFPRA, acted with the willful intent to injure Plaintiff, willfully covered up exculpatory evidence when it came to light, willfully

[2] Plaintiff does not oppose the dismissal of this Count as to any of the Defendants except Richard Garland.

refused to divulge exculpatory information to the police, and otherwise acted in bad faith and with a conscious disregard for Armstrong. Therefore, Plaintiff has stated a claim for punitive damages against Garland in both his official and individual capacities.

D. Plaintiff's claims against Garland should not be dismissed.

1. *Garland is not entitled to qualified immunity from plaintiff's federal claims*

Defendants assert—without argument or analysis—that Garland is entitled to qualified immunity for the federal malicious prosecution claim. This argument previously has been fully addressed by Plaintiff and rejected by this Court. As argued *supra*, these arguments should be construed as a Motion to Reconsider and rejected on the standards applicable to such motions. Defendants do not here offer any new or additional arguments to support their assertion.

Defendants assume all of Garland's acts qualify as discretionary acts. Plaintiff has the burden of demonstrating that the facts, as alleged, violated clearly established federal law. Suissa v. Fulton County, 74 F.3d 266, 269 (11th Cir. 1996) (citation omitted); see also Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151 150 L.Ed.2d 272 (2001) (same).

The right that Plaintiff seeks here to vindicate was "clearly established" at the time of her arrest and prosecution. As previously discussed, this case is closely analogous to the Buckner case, in which, as here, the Plaintiff's arrest and prosecution was caused by her supervisor, a Program Director, withholding exculpatory evidence, and providing false and misleading information, to law enforcement authorities, under circumstances in which he knew doing so would lead to the arrest and prosecution of Armstrong. Garland was acting within the scope of his duties as Executive Director of the RFPRA at all times relevant to this action. (See Plaintiff's Second Amended Complaint at ¶ 9).

The Court in Buckner surveyed the relevant law and determined not only that the employee stated causes of action for malicious prosecution under § 1983 against the Director, but also that the Director was not entitled to qualified immunity, to wit:

> The Eleventh Circuit has recognized "a federal right to be free from prosecutions procured by false and misleading information." *Kelly,* 21 F.3d at 1549 (internal quotation marks and citation omitted). Along these lines, this Circuit has held that a government official may be found liable under § 1983 for instigating or causing an unlawful arrest or malicious prosecution. *Cf., e.g., Jordan,* 487 F.3d at 1354 (holding that "[i]n this Circuit, a non-arresting officer who instigates or causes an unlawful arrest can still be liable under the Fourth Amendment"). In addition, "[k]nowingly making false statements to obtain an arrest warrant can lead to a Fourth Amendment violation." *Whiting,* 85 F.3d at 585 n. 5 (citing *U.S. v. Martin,* 615 F.2d 318, 327-29 (5th Cir.1980)); *accord Kalina v. Fletcher,* 522 U.S. 118, 122, 131, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997) (holding that § 1983 may provide a remedy when a prosecutor acting as a "complaining witness" misrepresents information in a probable cause certification); *Kingsland,* 382 F.2d at 1232 (noting that "falsifying facts to establish probable cause is patently unconstitutional").

As in Buckner, Plaintiff has sufficiently pled facts to show that Garland violated clearly established federal law when he initiated and instituted the malicious prosecution of Armstrong in violation of her Fourth Amendment rights. Further, the Defendants cannot argue that a citizens' rights to be free from unreasonable seizures and malicious prosecution in violation of the Fourth Amendment is not a "clearly established" right. Therefore, Garland is not entitled to qualified immunity for Plaintiff's Federal claims under § 1983.

2. *Garland is not entitled to official immunity from plaintiff's state law claims*

With respect to their contention that Garland is entitled to official immunity on Armstrong's state law claims, the only argument made by Defendants is that Armstrong has not alleged that Garland acted "with malice or an intent to injure." This is just plainly incorrect. As discussed at III(C)(2), III(C)(3), and III(C)(4) *supra* and throughout Plaintiff's Complaint, Plaintiff has sufficiently pled facts evidencing that Garland acted with malice and the intent to injure Plaintiff. Those facts include Garland knew that other coaches at the RFPRA regularly deposited funds from parents into their personal bank account, for sports-related purposes, and that doing so was not indicative of theft (See ¶¶ 20, 23); Armstrong was able to fully account for all funds, a fact that Garland withheld from and lied about to investigators (See ¶¶ 26-28); Garland knew there was no RFPRA policy prohibiting such action (See ¶¶ 21, 23); Garland knew that the assistant gymnastic coach regularly did the exact same thing, yet he never investigated her, and later promoted her to fill Armstrong's position (See ¶ 22); Garland refused to turn over exculpatory evidence to investigators (See ¶¶ 29-31); Garland sought to financially benefit from the arrest and prosecution of Armstrong (See ¶ 32).

Defendants have therefore totally failed to demonstrate that Garland is entitled to dismissal on official immunity grounds.

3. Plaintiff has pled sufficient claims against Garland in his official capacity

Defendants assert, without argument, that the "official capacity" claims against Garland should be dismissed, noting that Section 1983 claims cannot proceed upon a theory of *respondeat superior*. (Defendants' Brief at 31). Plaintiff agrees that an "official capacity" suit is essentially a claim against the legal entity represented by the official, and that Section 1983 liability against the entity is not established on a *respondeat superior* basis. However, Plaintiff's claims against Garland's office (and there is dispute at this point as to whether his "mothership entity" is RFPRA, City of Rome, Floyd County, or some combination thereof) is not based on *respondeat superior*, but upon Monell, in that Garland was the top policymaking official for RFPRA. Unless and until the record demonstrates that RFPRA is not a legal entity, and that RFPRA is not a part of the City of Rome or

Floyd County, dismissal of the official capacity claims against Garland is not warranted.

As set forth below, there are significant bases to find that RFPRA and Rome are liable for Garland's wrongful acts in this instance. However, assuming, arguendo, that the federal counts brought against Garland in his official capacity were dismissed, it should be noted that all state law claims, as well as claims brought against Garland in his individual capacity would stand.

E. Dismissal of Armstrong's claims against City of Rome is not proper.

Defendants appear to argue that Plaintiff's claims against them fail under the Supreme Court's holding in Monell and its' progeny.

Defendants point to paragraph 45 of the Second Amended Complaint, in which Armstrong alleges, as an alternate theory of liability, that officials of the City of Rome, Georgia, and Floyd County, Georgia, exercised deliberate indifference with respect to Garland's actions that led to Armstrong's malicious arrest and prosecution. (Defendants' Brief at 32). Noting Armstrong's simultaneous allegation that Garland was acting as a final policymaker for RFPRA and/or City of Rome and Floyd County, with respect to the actions alleged in the Complaint, Defendants assert that Armstrong "cannot have it both ways. Either Garland was…a final policymaker or… was subject to oversight."

First, we must be clear that, at the pleading stage, Plaintiff can, to an extent, have it both ways. There are two routes by which an entity may be held liable under Section 1983 for the acts of its officials. The first is when an act of a final policymaking official causes the harm. Pembaur v. City of Cincinnati, 475 U.S. 469, 479 (1986); Monell, 436 U.S. at 694. The second is when officials of the entity have exercised deliberate indifference with respect to known or obvious constitutional infirmities, and that deliberate indifference is the driving force behind the constitutional violation. City of Canton, Ohio v. Harris, 489 U.S. 378, 388-89, 109 S. Ct. 1197, 1204-05, 103 L. Ed. 2d 412 (1989).

In this instance, Plaintiff has pled both theories. While Defendants may, after development of the record, be able to show that one or the other theory cannot proceed to the jury, the fact that Plaintiff has pled potentially inconsistent theories at this point does not warrant dismissal. So long as a plaintiff acts in good faith, "[o]ur ordinary Rules recognize that a person may not be sure in advance upon which legal theory she will succeed, and so permit parties to 'set forth two or more statements of a claim or defense alternately or hypothetically,' and to 'state as many separate claims or defenses as the party has regardless of consistency.'" Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 805 (1999)(quoting Fed.R.Civ.Proc. 8(e)(2)).

In the instant case, there is certainly to be great debate and discussion of the questions whether RFPRA is a legal entity; if not, whether it is a part of City of Rome, Floyd County, or both; and, if RFPRA is not a legal entity, whether Garland was acting with final policymaking authority with respect to the functions of the RFPRA on behalf of City of Rome and/or Floyd County. Given the great uncertainty that currently exists regarding these questions, and given what Plaintiff currently knows about these entities—i.e. that Garland was the head of RFPRA, an entity whose legal standing is in question, but which was created and is jointly overseen by City of Rome and Floyd County—Plaintiff has acted in good faith in alleging these alternate theories of liability.

Defendant also asserts that Plaintiff's description of the relationship between Garland, the RFPRA, and the City of Rome is "merely conclusory." To the contrary, Plaintiff alleges that the RFPRA "is an entity that is jointly controlled and funded by Defendant Floyd County, Georgia and Defendant City of Rome, Georgia", and that Garland was the duly appointed Executive Director of the RFPRA. At all times relevant to this Complaint, Garland was a final policymaker with respect to the RFPRA…" (Complaint at ¶¶ 8-9). These are specific facts that describe and define what Plaintiff currently knows about the relationship among the parties.

To be fair, there seems to be confusion and disagreement even among the Defendants to this case as to the legal status of RFPRA and its relationship to the remaining Defendants. Rome, in the instant Motion, argues that RFPRA is not a legal entity. (Defendants' Brief at 32). Defendant, Floyd County, for its part, argues that, despite agreements that require it to fund and govern RFPRA, Floyd County is separate and apart from RFPRA. (Defendant Floyd County Georgia's Brief in Support of Motion for Judgment on the Pleadings [Doc. 35-1] at 8-10). Counsel for Floyd County has verbally stated to counsel for Plaintiff that RFRPA is a separate entity, with its own personnel, its own accounting, its own Federal Tax ID number, and the like. Therefore, the relationship among these parties remains unclear even amongst the Defendants themselves, and represents a highly factual determination that must be explored through discovery.

Plaintiff's theory that City of Rome and Floyd County are proper defendants is not simply based on a hunch. The local laws and intergovernmental agreements that created RFPRA provide significant support for Plaintiff's theory that RFPRA is a thing jointly controlled and overseen by City of Rome and Floyd County. The RFPRA is controlled by a board of nine individuals. Code of the City of Rome Georgia § 21-2 (1973) (Doc. 33-3, Exhibit B attached to Defendants' Motion to Dismiss at 1-2). This board has the power to appoint a director. Code of the City of Rome Georgia § 21-6 (1973) (Doc. 33-3 at

2). Of those nine individuals, six of them are Floyd County appointees and three of them are City of Rome appointees. Code of the City of Rome Georgia § 21-2 (1973) (See Doc. 33-3 at 1-2). "The city commission shall have the authority to remove a city-appointed member." Code of the City of Rome Georgia § 21-2(e) (1973) (Doc. 33-3 at 2). Further, the purpose of the RFPRA is to "carry on a recreation program for the **city and the county.**" Code of the City of Rome Georgia § 21-3 (1973) (emphasis supplied)(Doc. 33-3 at 2). Finally, Garland and his staff's salaries are set by the budget "established and approved" by the board, and this budget must be submitted and approved by both Floyd County and the City of Rome each year. Code of the City of Rome Georgia §§ 21-5 through 21-6 (1973) (Doc. 33-3 at 2).

Georgia Courts have long recognized a "joint enterprise or adventure" between cities and counties under circumstances closely analogous to the instant case. City of Eatonton v. Few, 189 Ga. App. 687, 689, 377 S.E.2d 504, 506 (1988). In Few, the City of Eatonton was sued for the wrongful death of a decedent in a pool that was owned by the City, but operated by the County pursuant to an agreement between those entities. Id. at 690. The City contended the pool was not a joint enterprise with the County. The Court disagreed, holidng:

> [B]y combining appellant's property and the maintenance labor of its employees with the operation labor of Putnam County's employees, a swimming pool was jointly maintained and operated for the residents of the city and the county. On this evidence, a finding was

> authorized that the swimming pool was a "joint enterprise," **regardless** of the lack of a profit motive and **notwithstanding** the parties' determination, as between themselves, how the control over the facility would be exercised. Id. at 690. (emphasis supplied).

Similarly, as set forth above, RFPRA is quite plainly a joint enterprise, created by and funded by City of Rome and Floyd County, with significant control by City of Rome and Floyd County through its power to appoint the Board of Directors. Plaintiff believes the evidence will further show that City of Rome exercises significant control over RFPRA's operations through its employment of RFPRA personnel.

As the Executive Director of a joint enterprise, Garland may also be "joint employee" of that enterprise, and when he made final policy decisions on behalf of the RFPRA, he was also making them on behalf of Floyd County and the City of Rome. The Eleventh Circuit has long recognized the concept of "joint employers" in the employment law context. See Virgo v. Riviera Beach Associates, Ltd., 30 F.3d 1350, 1359-61 (11th Cir. 1994). "To be considered a joint employer, an entity must exercise sufficient control over the terms and conditions of…employment". Id. at 1360. Here, Rome and Floyd County jointly appoint the board, who appoints the Executive Director and vests him with his power. The Executive Director serves the citizens of both Floyd County and the City of Rome in his role, and his compensation is set by a budget submitted to, and approved by, Floyd County and the City of Rome. This is especially true, if, as Defendants argue, RFPRA is not an independent entity capable of being sued. At the very least, the question of "joint employers" and "joint control" is a factual determination to be decided by a jury, and is not an appropriate determination to be made in the instant Motion. Virgo, 30 F.3d 1350 at 1360.

To be clear, Garland does not have to be at the very top of the chain of command for both Rome and Floyd County in order for him to be considered a final policymaker in the context of this case. Pembaur merely requires that the final policymaker be "responsible for establishing final policy ***with respect to the subject matter in question***". Pembaur, 475 U.S. at 483. (emphasis supplied). At all times relevant to this action, Garland was the Executive Director of the RFPRA. (See Second Amended Complaint at ¶ 9). In fact, the very Ordinance creating the RFPRA makes it quite clear that the Director is vested with complete control over RFPRA functions. Section 21-6 of the Code City of Rome Georgia, provides: "[t]he duties of [the] director shall be to plan, organize, **direct**, and **control** a county-wide recreation program, pursuant to the policy established by the Authority…". (See Doc. 33-3 at 2) (emphasis supplied). So, there is significant support for the proposition that Garland was at the top of food chain at least with respect to the operations of RFPRA.

Pembaur demonstrates the folly in Defendants' argument that a "final decisionmaker" has to be a single individual at the top of the food chain, who acts with no oversight. In Pembaur, the "decision maker" was an "Assistant Prosecutor," who worked under the lead prosecutor. Id. at 471. There were numerous individuals who exercised oversight over him, and his office; however, he was the ultimate decision maker with respect to the harmful action (service of capiases) complained of by the plaintiff, and thus, the municipality was held liable for his decision. Id.

Finally, it should be noted that Plaintiff's alternate theories—one, that Garland was a final policymaker, and two, that the government entities were deliberately indifferent in their oversight of him—are not necessarily inconsistent. A fair inference could be drawn that—although Rome and Floyd County *should have* been overseeing him, they recklessly failed to do so, rendering him the *de facto* final policymaker. "[I]n assessing whether a governmental decision maker is a final policymaker, we look to whether there is an *actual* opportunity for meaningful review." Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1292-93 (11th Cir. 2004) (emphasis supplied) (internal quotations omitted); see also Oladeinde v. City of Birmingham, 230 F.3d 1275, 1295 (11th Cir.2000) (emphasizing that there must be an actual "opportunity" for "meaningful administrative review" before we conclude that a governmental decision maker lacks final policymaking authority); Bowen v. Watkins, 669 F.2d 979 (5th Cir.1982) ("If a higher official has the power to overrule a decision but as a practical matter never does so, the decision maker may represent the effective final authority on the question").

Thus, there are numerous viable legal theories under which the "official" defendants are liable--under Monell, Pembaur, and Eleventh Circuit precedent—for the wrongful acts of Garland, in the context of this case.

Further, Defendant City of Rome may be held liable for Plaintiff's state law claims under the theory of *respondeat superior*, because, as discussed at length at III(C)(2), III(C)(4), III(C)(5) *supra*, the underlying state law claims against Garland have been sufficiently pled to state a cause of action.

F. Plaintiff has sufficiently pled her claims against Defendant RFPRA so as to satisfy Monell

Similarly, as discussed at III(E) *supra,* it is premature to determine that RFPRA not a legal entity that may be held liable for Garland's acts under Monell, Pembaur, and Eleventh Circuit precedent (for Federal claims) and the theory of *respondent superior* (for State law claims), and Plaintiff has sufficiently pled each such claim. The RFPRA was created, and "vested with…rights, duties, and responsibilities" pursuant to Georgia Law at O.C.G.A. § § 36-64-1 through 36-64-14. (Floyd County Code § 2-13-2(7)). (See Doc. 33-4 at 4). These "rights, duties, and responsibilities" include:

> [The] power to provide, maintain, and conduct parks, playgrounds, recreation centers, and other recreational activities and facilities…to maintain and equip parks, playgrounds, recreation centers, and the

> buildings thereon; to develop, maintain, and operate all types of recreation facilities; and to operate and conduct facilities on properties controlled [and to] employ … officers or employees as it deems are needed.

Ga. Code Ann. § 36-64-3 (West).

An entity may sue or be sued when powers granted to it by statute implicate the right to sue or be sued. Clark v. Fitzgerald Water, Light & Bond Comm'n, 284 Ga. 12, 14, 663 S.E.2d 237, 239 (2008). RFPRA, and its employees, pursuant to Georgia law, maintain premises and property, interact with citizens under color of law, and RFPRA hires and fires individuals. Accordingly, the RFPRA is an entity capable of being sued.

Moreover, Floyd County has, in essence, taken the position that RFPRA is a legal entity, by stating that Floyd County has no formal relationship to it. Counsel for Floyd County has verbally represented to counsel for Plaintiff that RFPRA is a legal entity, with its own personnel, accounting, and federal tax ID number.

However, assuming arguendo, that the RFPRA is not an entity capable of being sued, then the City of Rome and Floyd County, entities who are capable of being sued, are still liable for Garland's official acts undertaken as the Executive Director of the RFPRA, on behalf of City of Rome and Floyd County.

IV. CONCLUSION

For these reasons, Armstrong respectfully submits that this Court must DENY in full these Defendants' Motion with Respect to Counts III (state law malicious prosecution), IV (Section 1983 malicious prosecution), V (intentional infliction of emotion distress against Garland), and VI (O.C.G.A. § 36-33-4 against Garland); DENY these Defendants' Motion with Respect to claims against Garland under Count VII (punitive damages); and dismiss without prejudice Counts I (state law false arrest) and II (Section 1983 false arrest).

Respectfully submitted this 11th day of June, 2013.

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Local Rule 7.1D Certification

By signature below, counsel certifies that the foregoing document was prepared in Book Antiqua, 13-point font in compliance with Local Rule 5.1B.

Certificate of Service

The undersigned certifies the foregoing document was electronically filed on June X, 2013 with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

/s/ James Radford
James Radford
Georgia Bar No. 108007

Counsel for Plaintiff